



TMG FINANCIAL SERVICES

January 3, 2011

Jennifer J. Johnson
Secretary of the Board
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, Northwest
Washington, DC 20551

Re: Docket No. R-1393 and RIN No. 7100-AD55

Dear Ms. Johnson:

We appreciate the opportunity to comment on proposed amendments by the Board of Governors of the Federal Reserve System (the "Board") to the Regulation Z provisions that implement the Credit Card Accountability Responsibility and Disclosure Act of 2009 (the "Credit Card Act"). TMG Financial Services was created to provide credit unions with an alternative for managing their credit card portfolio. We partner with over 40 credit unions via an agent-issuing agreement to offer a member-friendly credit card product that maintains the credit union's name and brand, creating a seamless member experience. Today, TMGFS' portfolio consists of 55,000 accounts and \$118 million in credit card receivables.

Our comments will focus on Section 226.51 – the proposed amendments pertaining to the Ability to Pay provision of the CARD Act.

TMGFS is concerned about the Board's interpretation of Section 109 of the CARD Act (the "Ability to Pay" provisions). There is no apparent statutory basis for the proposed rulemaking. The implications of this rulemaking will limit the ability for all consumers who don't earn 100% of their household income to secure credit regardless of their credit history, even if they independently generate income. Further, this new rule will necessitate the creation of new underwriting practices that differ from the standard practice of virtually every other consumer loan, placing an undue burden on creditors that could ultimately result in harm to consumers in the form of higher fees. Finally, creditors will be open to liability from lawsuits resulting from Regulation B violations due to disparate impact on protected classes. For these reasons, we ask the Board to withdraw the proposed amendments to the ability to pay provision.

Congressional Intent

The provision of the CARD Act at issue in the rulemaking prohibits an issuer from opening a credit card account unless the issuer "considers the ability of the consumer to make the required payments." Contrast Section 109 of the CARD Act with Section 301, which applies to consumers who are under 21 years of age and specifically calls out the applicant's independent ability to pay:

“No credit card may be issued to, or open end consumer credit plan established by or on behalf of, a consumer who has not attained the age of 21, unless the consumer has submitted a written application to the card issuer... the application shall require— (i) the signature of a cosigner, including the parent, legal guardian, spouse, or any other individual who has attained the age of 21 having a means to repay debts incurred by the consumer in connection with the account, indicating joint liability for debts incurred by the consumer in connection with the account before the consumer has attained the age of 21; or (ii) submission by the consumer of financial information, including through an application, indicating an independent means of repaying any obligation arising from the proposed extension of credit in connection with the account.”

The language of Section 301 is clearly different from Section 109, reflecting a clear intent by Congress in treating people who are under 21 differently from the rest of the population by explicitly calling out the necessity for joint liability or the independent means to pay. No such language exists in Section 109. If the intent of Congress was the same as the Board speculates, the above paragraph would be inserted in Section 109 will all reference to 21 year olds stricken, but it is not. Thus, TMGFS is concerned that the Board is imputing a similar intent to Section 109 as that of Section 301, but there is no basis for this interpretation.

The Role of the Household

The question the statute raises is, “From what means can a consumer draw from to make the required payments?” Until now, the household has been seen by creditors and consumers as the primary and appropriate unit with which to gauge income and assets, as the household is the basic residential unit in which economic production, consumption and inheritance are organized and carried out.

TMGFS is in agreement with Congress on the necessity to call out 18 - 21 year olds and provide them with separate statutory protections. Most persons in this age category are in the process of divorcing themselves financially from the household they grew up in or are newly establishing households of their own. When a full-time, non-working college student applies individually for a credit card and lists the parents’ income as sole means of repayment, at best there is an assumption by the applicant that the parents will assist in paying off the debt; at worst, it is misrepresentation. The statute is proper in requiring creditors to establish independent means of repayment or joint-liability.

However, once a person has established an economic household individually or with another, income is generally pooled to meet living expenses, purchase assets such as automobiles and real estate, pay taxes, and take on installment and revolving debt. If the husband or wife dies, laws of decent and distribution generally ensure the surviving spouse will receive at least a portion of the marital property.

Underwriting Distortion and Consumer Impact

For the past 35 years, creditors have underwritten consumer loan products by assessing credit risk at the individual level and ability to pay at the household level. Legislation and regulation has supported this method, which in turn has ensured fair and equitable consumer access to credit. The proposal threatens to distort the underwriting process for credit cards alone by compelling creditors to consider only independent income for individual consumers through the use of ratios and measures that have historically been derived based on household information. This would require creditors to manually determine these ratios with little guidance on how to pro-rate the debt. The resulting chaos would in effect freeze out all individuals who are not the primary earners in a household that has taken on significant joint debt.

Underwriting practices have, over time, aggregated income, debt levels, and various payment ratios at the household level based on the practical experience among households outlined above. In the proposal, the Board comments regarding Section 226.51(a)(1)(ii), "For all consumers, a card issuer must consider either the ratio of debt obligations to income, the ratio of debt obligations to assets, or the income the consumer will have after paying debt obligations." These ratios have to date been calculated at the household level. So in evaluating the ability to pay, the Board would compel creditors to consider the consumer's independent income against the individual obligations of the consumer AND all joint obligations such as auto loans and mortgages that were obtained by the household on the basis of household income.

Given that debt on joint accounts is not pro-rated by the credit reporting agencies, under the proposal creditors would be compelled to calculate debt to income ratios with exaggerated debt levels, resulting in no change in the calculation for those consumers who earn 100% of their household income and adverse impact for every other consumer whether they can demonstrate independent income or not.

The Board's apparent remedy of applying for jointly issued credit cards isn't consistent with the practical experience of how consumers apply for and use credit cards today. Also, the remedy creates discrimination within the household, where the income-earner(s) would have the option to apply individually or jointly but those low or no income earners would be at the mercy of a joint applicant to gain access to credit.

Disparate Impact and Regulation B

The adverse impact resulting from the above action will be disproportionately distributed to those consumers who earn no or low income. According to the U.S. Census, those populations who would be affected most often would be women, minorities, and the elderly who have limited assets.

We believe the Board's new interpretation ignores the reason creditors have interpreted Regulation B as requiring consideration of spousal or household income. Creditors' long-standing interpretation has reflected the Congressional goal of enabling married women to establish credit in their own right by relying on household income and assets.

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We recognize the Board comment that “Regulation B does not compel the issuer to consider the income of the consumer’s spouse” when making an individual credit decision. However, given the anticipated effect of the proposal, when reviewing these decisions in the aggregate, creditors run the risk of disparate treatment by failing the effects test. The commentary to Regulation B provides the following with respect to the effects test:

“The Act and regulation may prohibit a creditor practice that is discriminatory in effect because it has a disproportionately negative impact on a prohibited basis, even though the creditor has no intent to discriminate and the practice appears neutral on its face, unless the creditor practice meets a legitimate business need that cannot be reasonably achieved as well by means that are less disparate in their impact.” *Supplement 1 to Part 202—Official Staff Interpretations: Comment 6(a) -2*

As a result, creditors could be liable against fair lending claims under Regulation B and other state and federal fair lending laws. We request that the Board retract these statements, however if the Board chooses to adopt any ability to pay amendment that could have the potential impacts noted above, we ask the Board to confirm its "safe harbor" interpretation in formal guidance issued pursuant to Regulation B prior to any mandatory compliance date for that amendment.

On behalf of TMGFS and our 40-plus credit union partners, I thank you again for this opportunity to comment on the Board's recently proposed clarifications to Regulation Z's open-end credit rules. If you have questions on any aspects of this letter, please contact me at (515) 457-5264.

Sincerely,

A handwritten signature in dark ink, appearing to read "Eric Schurr", with a stylized, flowing script.

Eric Schurr
Vice President, Credit & Risk
TMG Financial Services